KISHABAI v. JAIKISHAN

[O.C.J. (B.T.H. Lee J.) May 20, 1981]

[Kuala Lumpur — Originating Summons No. 223 of 1977]

Trust — Life insurance policy — Trust of the benefit in favour of the defendant-nephew — Validity of trust — Revocation of trust in deceased's lifetime — Assignment of trust to plaintiff/daughter — Failure of deceased to reserve express power of revocation — Validity of assignment — Civil Law Ordinance, 1956, s. 23.

Insurance — Life insurance policy — Trust of the benefit in favour of nephew — Validity of trust — Civil Law Ordinance, 1956, s. 23.

The present case arose out of an application by Great Eastern Life Assurance Co. Ltd. for interpleader relief against the claims of the plaintiff and the defendant for the proceeds of a life insurance policy taken out by the deceased.

The plaintiff in this case is the daughter of the deceased. The defendant is the nephew of the deceased. By an endorsement dated May 28, 1971, the deceased created a trust in favour of the defendant under section 23 of the Civil Law Ordinance, 1956. By an agreement dated May 3, 1974 made between the deceased and the defendant, the deceased agreed, *inter alia,* that "neither he nor his agents nor heirs will claim any of the money or monies that will be paid on the insurance policies of his life, that have been assigned to (the defendant) including Policy No. 305676 of which he is sole beneficiary".

On May 17, 1974, the deceased, by a will, devised and bequeathed all his real and personal property to the plaintiff and appointed her executrix and trustee of the Will. On September 25, 1975 the deceased reassigned the benefits of the policy to himself. On the same day too the deceased absolutely assigned the benefit of the policy to the plaintiff. The deceased died on March 24, 1976, and on April 22, 1977 the plaintiff extracted Grant of Probate in respect of the deceased's estate.

Held: (1) the purpose of section 23 of the Civil Law Ordinance, 1956 is to protect the interests of the widow and the children of a deceased assured who has created a trust in their favour pursuant to its provisions;

(2) the defendant in this case would not have the protection afforded to the widow and children of the deceased assured. The proceeds of such a policy would form part of the estate of the assured and be subject to the deceased assured's debts;

(3) in interpreting a statute, it is not always a rule of construction to decide according to the strict letter of the statute, and it is given to the courts to consider what is its fair meaning and expound it differently from the letter in order to preserve the intent;

(4) no particular form of expression is necessary for the creation of a trust, if on the whole it can be gathered that a trust was intended;

(5) the trust created on May 28, 1971 in favour of the defendant was valid by reason of the fact that all the prerequisites of a trust had been fulfilled;

(6) in the absence of any express power of revocation contained in the said endorsement, the trust thus created by the deceased in favour of the defendant was still in existence;

(7) the deceased was in the circumstances not entitled to revoke the trust he had created in favour of the defendant and to re-assign the benefit of the said policy to himself and thereafter assign the benefit to the plaintiff.

Cases referred to:-

(1) *In re Yeo Hock Hoe's Policy* [1938] M.L.J. 33.

(2) *Engineering Industry Training Board* v. *Samuel Talbot (Engineers) Ltd. & Anor.* [1969] 2 Q.B. 270.

(3) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1956] 1 All E.R. 256.

ORIGINATING SUMMONS.

K.L. Rekhraj for the plaintiff.

Khaw Chay Tee for the defendant.

Cur. Adv. Vult.

B.T.H. Lee J.: On an application by Great Eastern Life Assurance Co. Ltd. for interpleader relief against the claims of Kishabai d/o Tikamdas Bhojumall (hereinafter referred to as "the plaintiff") and Jaikishan Rewachand (hereinafter referred to as "the defendant") to the proceeds of a life insurance policy No. 305676 and pursuant to the order of the court dated July 5, 1977, the following case has been stated for the opinion of the court.

As presented to this court, the argument raises two questions: —

(a) Whether the creation of the trust of the benefit of the insurance policy No. 305676 in favour of the defendant was valid, void or voidable?

(b) Whether the deceased was entitled to revoke the trust, reassign the policy No. 305676 to himself and thereafter absolutely assign the policy in favour of the plaintiff?

The undisputed facts which have led up to this litigation required to be stated in some detail in order to make plain the points which arise for decision.

(1) The plaintiff is the only child and lawful daughter of one Tikamdas s/o Bhojumall (hereinafter referred to as "the deceased").

(2) The defendant is the nephew of the deceased.

(3) On or about December 31, 1970, the deceased took out a Life Insurance Policy No. 305676 with the Great Eastern Life Assurance Co. Limited (hereinafter called "the Insurance Company") against his life for the sum of $50,000.

(4) By an endorsement thereunder dated May 28, 1971, the deceased created a trust in favour of the defendant under section 23 of the Civil Law Ordinance, 1956.

(5) By an agreement dated May 3, 1974 made between the deceased and the defendant, the deceased agreed, *inter alia,* for the consideration therein that "neither he nor his agents nor heirs will claim any of the money or monies that will be paid on the insurance policies on his life, that have been assigned to Jaikishan s/o Rewachand, including Policy No. 305676 of which he is sole beneficiary. The total insured value of all these policies is $115,000 only."

(6) On May 17, 1974, the deceased, by a Will, devised and bequeathed all his real and personal property to the plaintiff and appointed her the executrix and trustee of the Will.

(7) On September 25, 1975, the deceased reassigned the benefits of the policy to himself.

(8) By a letter dated October 31, 1975, the Insurance Company acknowledged receipt of the Notice of Reassignment.

(9) On September 25, 1975, the deceased absolutely assigned the benefit of the policy to the plaintiff.

(10) By a letter dated October 31, 1975, the Insurance Company acknowledged the said absolute assignment.

(11) The deceased died on March 24, 1976.

(12) On April 22, 1977, the plaintiff extracted Grant of Probate in respect of the deceased's estate.

In respect of paragraph (4) of the special case stated above, the terms of the said endorsement in favour of the defendant are expressed as follows:

"THE GREAT EASTERN LIFE ASSURANCE COMPANY LIMITED

INDORSEMENT

28th May, 1971.

Policy No. 305,676

This policy is effected under section 23 of the Civil Law Ordinance, 1956 Federation of Malaya and the Trustees or Trustee for the time being hereof shall hold this policy and all monies assured hereby or payable hereunder in trust for Jaikishan Rewachand, nephew of the Assured.

The present Trustee for the purpose of the said Ordinance is the said

Jaikishan Rewachand

and the power of appointing new Trustees hereof shall be vested in the Assured during his lifetime.

This policy cannot be surrendered or used as security for a loan unless the trustees and the beneficiary concur and are under no legal disability.

Secretary."

It falls for observation that the word "CANCELLED" was stamped across the words appearing in paragraphs 1 and 3 of the Indorsement above at a later date, presumably when the deceased purported to assign the benefit of the said policy to the plaintiff.

By an Agreement made on May 3, 1974, between the deceased and the defendant (briefly called "the Agreement"), the deceased accepted from the defendant:

(i) the transfer of the property of the defendant at Balai Panjang, Melaka held under Interim Register half share Lot No. 377 Mukim of Balai Panjang, Melaka;

"that neither he nor his agents nor heirs will claim any of the money or monies that will be paid on the insurance policies on his life, that have been assigned to Jaikishan s/o Rewachand, including Policy No. 305676 of which he is sole beneficiary. The total insured value of all these policies is $115,000 only."

(ii) the sum of $10,000, and in return agreed and solemnly vowed:

From the indorsement, it seems to me quite clear that the transfer of the property held under Interim Register No. 377 Mukim of Balai Panjang, Melaka from the defendant to the deceased was carried out in accordance with the Agreement as it appears as an asset of the deceased at the time of his death in the Certificate of the Collector of Estate Duty, Tanah Melayu dated March 8, 1977.

(See Exhibit "K2" in Affidavit in Reply of Kishinabai Pokardas Gianchandani w/o Pokardas Gunomal (f) affirmed on June 2, 1977).

A point is made by counsel on behalf of the defendant and it is significant to note from the Agreement that:

(i) The deceased referred specifically to Policy No. 305676 which is the subject-matter of this dispute, and agreed in terms that neither he nor his agents nor heirs would claim any of the monies to be paid on the said policy.

(ii) Having had the land of his nephew transferred to the deceased, the deceased believed at that material point of time that he had validly assigned the benefit of the said policy to the defendant.

On May 17, 1974, the deceased, by a Will, devised and bequeathed all his real and personal property whatsoever and wheresoever to which he might be entitled or over which he had any disposing power at the time of his death to the plaintiff and also appointed her sole executrix and trustee — to which reference has been made at paragraph 6 of undisputed facts.

It is to be noted that no specific legacies were made and in particular, the benefit of the said policy was not mentioned.

On September 25, 1975, the deceased apparently purported to re-assign the benefits of the said policy to himself and thereafter absolutely assigned the same to the plaintiff. (Paragraph (7) of Special Case stated above).

By two letters, both dated October 31, 1975, the Insurance Company acknowledged the transactions. Included in both letters was a proviso that "the Company in acknowledging the assignment or consenting thereto, does not assume any responsibility for the validity of such assignment or charge".

That brings me to the substantial point relied on by counsel for the plaintiff viz.,

"whether the creation of the trust of the benefit of the said policy in favour of the defendant was valid, void or voidable?"

In the argument presented to me, it was contended that as the trust is effected under section 23 of the Civil Law Ordinance, 1956 (hereinafter called "the Ordinance"), the word "nephew" is excluded from the provisions of section 23, and therefore the defendant is not one of the persons stipulated under the section; the trust created is accordingly null and void.

Upon reading the section, it seems clear that the purpose of the section is to protect the interests of the widow and children of a deceased assured who has created a trust in their favour pursuant to its provisions. In other words, the legislature, viewing with sympathy any effort by a man to provide for his wife and family after his death, has provided that a man may insure his life at any time for their benefit and any monies payable under the policy shall not go to pay his debts, but shall be held in trust for his family. And so far is this policy of protection carried that even when it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, the fact will not defeat the trust, but the creditors will be entitled to receive out of the monies payable under the policy, only the sums actually paid by way of premiums — see *In re Yeo Hock Hoe's Policy*[1] *per* Deane J. at page 34.

This makes it necessary for me to deal with the point raised namely, what, if any, legal effect section 23 of the Ordinance has upon the creation of a trust,

when the object therein named is a nephew — the defendant in the instant case — and not the spouse or child of the assured?

In my view, there can be no doubt as to the validity of the trust, but the nephew — the defendant herein — would not have the protection afforded to widow and children of the deceased assured, and it would seem to follow, in my judgment, that the proceeds of such a policy would form part of the estate of the assured and be subject to the deceased assured's debts.

Counsel for the plaintiff takes the point that the trust created under section 23 in favour of the nephew is void which is, in my opinion, untenable. There is nothing in the section which suggests that result nor to justify the conclusion to which he invites the court to come.

In interpreting a statute, it is not always a rule of construction to decide according to the strict letter of the statute, and it is given to the courts to consider what is its fair meaning and expound it differently from the letter in order to preserve the intent. Lord Denning M.R. in *Engineering Industry Training Board* v. *Samuel Talbot (Engineers) Ltd. & Anor.*[2] has made the following observation at page 274:

"But we no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent."

The trust created on May 28, 1971 in favour of the defendant is, in my opinion, valid by reason of the fact that all the prerequisites of a trust have been fulfilled. (See *Snell's* Principles of Equity, 27th Edition, at page 111).

There was a clear intention on the part of the deceased to create a trust in favour of the defendant. The said Indorsement stated categorically and I quote, that "the Trustee shall hold this policy and all monies assured hereby or payable hereunder in trust for Jaikishan Rewachand, nephew of the assured".

As was very properly observed, no particular form of expression is necessary for the creation of a trust, if on the whole it can be gathered that a trust was intended — *Snell's* Principles of Equity, 27th Edn., at page 111.

It was however urged on behalf of the defendant that in this case the said Indorsement is in itself sufficient evidence of the intention on the part of the deceased to create a trust in favour of the defendant.

I would however refer to the case in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*,[3] where Lord Denning in the course of his speech said at page 259:

"I prefer to apply the principle that the promise, intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply."

This case has survived and stood unquestioned as an authority since 1946.

Secondly, the subject-matter of the trust is certain, i.e. the entire proceeds of the life policy.

Thirdly, the object of the trust is ascertained in that the defendant is specifically named and described as sole beneficiary. That being the position, it seems to me that an executed completely constituted valid trust in favour of the defendant was created with the said Indorsement dated May 28, 1971 to the said policy. That it was purportedly created pursuant to section 23 of the Ordinance does not detract from the fact that all the requisites of a valid trust were present.

In the whole of the circumstances of this case, and for the reasons I have stated, the answer to the first question posed is that the creation of the trust of the benefit of the said policy in favour of the defendant was valid.

I now turn to the second of these questions viz., "Whether the deceased was entitled to revoke the trust, reassign the said policy to himself and thereafter absolutely assign the policy in favour of the Plaintiff?"

To be able to revoke the trust created, the deceased must have reserved for himself an express power of revocation — *Snell's* Principles of Equity, 27th Edn., p. 126. It may be observed that the said Indorsement merely reserves to the deceased the power of appointing new trustees, and not a power to revoke the trust. The clause entitled "To whom Payable" appearing at page 1 of the said policy governs the contract between the Insurance Company and the deceased, and of which the defendant is not a party, and not, as has been suggested by counsel for plaintiff that by virtue of the said clause, power to revoke the trust was thereby reserved to the deceased.

The Indorsement clearly shows that the trust was created by the deceased in favour of the defendant. In the absence of any express power of revocation contained therein, the trust thus created by the deceased in favour of the defendant still stands and is in existence.

There can be no doubt whatever that the deceased believed that he had done everything within his power validly to assign the benefit of the said policy to the defendant, and intended that the defendant be the sole beneficiary of the proceeds thereof. Although the form of the trust created by the Indorsement was not legally proper — in that a "section 23" trust was created in favour of a nephew, the intent was clearly to benefit the defendant and the defendant alone and in consequence the trust ought to be enforceable by the defendant for equity looks on the intent and not the form. I am of the view that the deceased was in the circumstances not entitled in September 1975 to revoke the trust he had created in favour of the defendant and to re-assign the benefit of the said policy to himself and thereafter assign the benefit to the plaintiff and that being so, the defendant ought to be the sole beneficiary of the proceeds therefrom.

It is apposite to note that the plaintiff fills a dual role. She sues as assignee of the benefit of the said policy as well as the sole executrix of the estate of the deceased by virtue of the deceased's will dated May 17, 1974. In so far as her claim in her capacity as executrix of the estate of the deceased is concerned, she is estopped by virtue of the covenants expressed by the deceased in the last paragraph of the Agreement dated May 3, 1974, and from denying

the defendant's claim to the proceeds of the Life Insurance policy.

In respect of her claim as assignee, there is a prior valid executed and fully constituted trust for value having been created in favour of the defendant prior to the assignment in her favour, the plaintiff could derive no benefit from the later purported absolute assignment.

In the circumstances appearing, and for the reasons set out above, I make the following orders:

(a) That the sum of $39,317.13 paid into court be paid out to the defendant;

(b) That the plaintiff do pay to the defendant the costs of this action;

(c) That the plaintiff do pay to The Great Eastern Life Assurance Company Limited, the Interpleader, the costs of the Interpleader proceedings herein.

Order accordingly.

Solicitors: *K.L. Rekhraj & Co.; Allen & Gledhill.*

PUBLIC PROSECUTOR v. MUHAMMAD SITUL B. SAHRI
PUBLIC PROSECUTOR v. CHEW AH BAH

[A.Cr.J. (Mohamed Azmi J.) July 10, 1981]

[Kuala Lumpur — Federal Territory Criminal Appeals Nos. 66 & 68 of 1981]

Road Traffic — Driving Licence — Endorsement — "Special Reason" — Road Traffic Ordinance, 1958, s. 36(1).

When a person is convicted under section 36(1) of the Road Traffic Ordinance, 1958, it is mandatory to order endorsement, but the court has a discretion to order otherwise if there is a special reason as opposed to a reason of general character. The reason must be special to the offence, that is, special to the facts which constitute the offence, and not special to the offender.

Cases referred to:-

(1) *R.* v. *Crossan* (1939) N.I. 106.

(2) *Whittall* v. *Kirby* (1947) 1 K.B. 194, 201.

(3) *Re Kanapathipillai & Ors.* (1960) M.L.J. 243.

MAGISTRATES' CRIMINAL APPEAL.

Gooi Soon Seng (Deputy Public Prosecutor) for appellant in F.T.C.A. No. 66 of 1981.

Phang Ah Hee (Deputy Public Prosecutor) for appellant in F.T.C.A. No. 68 of 1981.

Respondents in F.T.C.A. No. 66 of 1981 and F.T.C.A. No. 68 of 1981 in person.

Mohamed Azmi J.: I have allowed both these appeals and I now proceed to give my reasons.

In these two cases, the Public Prosecutor had appealed against the decision of the Magistrate for failing to endorse the respondents' driving licence after they had pleaded guilty to driving their vehicles without due care and attention, an offence punishable under section 36(1) of the Road Traffic Ordinance, 1958.

In the first case, the respondent, Muhammed Situl bin Sahri, whilst overtaking a motor car collided into an oncoming motorcycle at Jalan Sentul, Kuala Lumpur, on March 14, 1980 at about 2.20 p.m. Whilst in the second case, the respondent, Chew Ah Bah, collided into the rear of another vehicle at Syed Putra Roundabout also at Kuala Lumpur on February 24, 1980 at about 6.45 p.m. In both cases, it would appear that the learned Magistrate had found some difficulties in interpreting the meaning of "special reason" found in section 36(2) of the Road Traffic Ordinance which provides:

"The court shall (unless for any special reason it thinks fit to order otherwise) order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted."

What section 36(2) means is that the court has no discretion not to order endorsement unless there is special reason. It was Lord Goddard who first suggested in his address to Magistrates assembled at the Summer Assizes for Essex in 1937, that the reasons must be special to the offence and not to the offender. This suggestion was adopted by the King's Bench Division of Northern Ireland in *R.* v. *Crossan.*[1] Subsequently, in delivering the judgment of the Court of Criminal Appeal in *Whittall* v. *Kirby,*[2] the following test applied in *R.* v. *Crossan* was adopted by Lord Goddard in determining what in law amounted to a special reason:

"A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception."

The principle enunciated in *Whittall* v. *Kirby* had been applied locally in *Re Kanapathipillai & Ors.,*[3] a case which all Magistrates are well advised to be familiar with. The law pertaining to endorsement of driving licence under section 36(2) Road Traffic Ordinance appears to be this. When a person is convicted under section 36(1), it is mandatory to order endorsement, but the court has a discretion to order otherwise if there is a special reason as opposed to a reason of general character. Further, the reason must be special to the offence, that is, special to the facts which constitute the offence, and not special to the offender.

In the present appeals, in refusing to order endorsement, the learned Magistrate had accepted the following facts as constituting "special reasons": —

(a) respondent was a first offender;

(b) respondent was holding a provisional driving licence;

(c) that the accident was caused by an error in the respondent's judgment of his distance from the oncoming motorcycle at the time of overtaking.

In the second case, the learned Magistrate had held the following factors as "special reasons": —

(a) the respondent had been driving for the past ten years with a clean record;